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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN RE: KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen, deceased, pursuant to the laws of the Federal Republic of Germany

EDGARDO L. PARUNGAO,
Petitioner,

v.

KLAUS HUBERT GOERG,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether, in a case of first impression, the Court of Appeals erred in its decision that, by enacting § 304 of the United States Bankruptcy Code, Congress intended to disturb the heretofore exclusive jurisdiction exercised by the states over probate proceedings by extending federal jurisdiction to provide for bankruptcy court administration of the United States assets of a foreign decedent's estate?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Edgardo L. Parungao, Georgia Administrator *cum testamento annexo* of the estate of Heinz Guenter Kaussen, deceased, and the Respondent, Klaus Hubert Goerg, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen pursuant to the laws of the Federal Republic of Germany.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
A. Procedural and Factual Background	4
B. Basis for Federal Jurisdiction	6
REASONS FOR GRANTING THE PETITION	7
I. The Decision Of The Eleventh Circuit Is Contrary To The Apparent Intent Of Congress In Enacting § 304 Of The Bankruptcy Code	8
II. The Decision Of The Eleventh Circuit Is A Significant Departure From The Well Established Procedure In This Country Regarding The Administration Of Decedents' Estates And Probate Jurisdiction	14
III. The Decision Of The Eleventh Circuit Concerns An Important Federal Question Having Profound Precedential Implications	17
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Blackwell v. Grant, 46 Ga.App. 241, 167 S.E. 333 (1933) 15
City of Indianapolis v. Chase Nat. Bank of City of New York, 62 S.Ct. 15, 314 U.S. 63, 86 L.Ed. 47 (1941), rehearing denied *Chase Nat. Bank of City of New York v. Indianapolis Gas Co.*, 62 S.Ct. 355, 314 U.S. 714, 86 L.Ed. 569, and three cases 62 S.Ct. 356, 314 U.S. 714, 86 L.Ed. 569 17
Cunard Steamship Co. Ltd. v. Salen Reefer Servs. AB, 773 F.2d 452 (2d Cir. 1985) 12
In re Estate of Brown, 16 Bankr. 128 (Bankr. D.D.C. 1981) 10
In re Estate of Hiller, 240 F.Supp. 504 (N.D.Cal. 1965) 7
In re Estate of Patterson, 64 Bankr. 807 (Bankr. W.D. Tex. 1986) 10
In re Estate of Whiteside by Whiteside, 64 Bankr. 99 (Bankr. E.D.Calif. 1986) 10
Farrell v. O'Brien, 199 U.S. 89, 25 S.Ct. 727, 50 L.Ed. 101 (1905) 7
Gibson v. Gaines, 46 Ga.App. 458, 167 S.E. 782 (1933) 15
Goerg v. Parungao (In re Goerg), 844 F.2d 1562 (11th Cir. 1988) 12
Harris v. Zion's Bank Co., 317 U.S. 447, 63 S.Ct. 354, 87 L.Ed. 390 (1943) 7
Healy v. Ratta, 292 U.S. 263, 54 S.Ct. 700, 78 L.Ed. 1248 (1933) 17
Markham v. Allen, 326 U.S. 490, 66 S.Ct. 296, 90 L.Ed. 256 (1945) 7, 14
Matter of Jarrett, 19 Bankr. 413 (Bankr. M.D. N.C. 1982) 10
Matter of 299 Jack-Hemp Associates, 20 Bankr. 412 (Bankr. S.D.N.Y. 1982) 10
Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed. 2d 598 (1982) 12, 17

TABLE OF AUTHORITIES—Continued

	Page
Sutton v. English, 246 U.S. 199, 38 S.Ct. 254, 62 L.Ed. 644 (1918)	7
Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 30 S.Ct. 10, 54 L.Ed. 80 (1909)	7
STATUTES	
Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 101 *et seq.*	*passim*
Section 101(12)	10
Section 101(22)	10, 18
Section 101(35)	10
Section 304	*passim*
Official Code of Georgia Annotated	
Section 53-3-42	15
Section 53-3-43	15
Sections 53-4-1 to -54	15
Section 53-4-8	15
Sections 53-5-1 to -21	15
Sections 53-7-70 to -107	15
28 U.S.C. § 158(a)	6
28 U.S.C. § 158(d)	6
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1334	13, 17
28 U.S.C. § 1410	16
U.S. Sup. Ct. Rule 17, 28 U.S.C.	14
CONGRESSIONAL MATERIALS	
H.R.Rep. No. 595, 95th Cong., 2d Sess. 313, *reprinted in*, 1978 U.S. Code Cong. & Admin.News 5963, 6720	10
S.Rep. No. 989, 95th Cong., 2d Sess. 25, *reprinted in* 1978 U.S. Code Cong. & Admin.News 5787, 5811	10
MISCELLANEOUS AUTHORITIES	
2, *Collier on Bankruptcy*, ¶ 304.1, at pp. 304-12 to -14 (15 ed. Supp. June 1985)	8, 11

TABLE OF AUTHORITIES—Continued

	Page
Uniform Probate Code,	
Sections 2-101 to -404	15
Sections 2-601 to -902	15
Sections 3-801 to -816	15
Sections 3-901 to -916	15
Art. IV	12
Sections 4-101 to -401	15

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v.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Edgardo L. Parungao, through his counsel, petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit rendered in this case on May 18, 1988. A petition for Rehearing and en banc consideration was denied on July 18, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit dated May 18, 1988 is reported at 844 F.2d 1562 and is reproduced in the Appendix hereto at page 1a.

The order and opinion of the United States District Court for the Northern District of Georgia, Atlanta Division dated January 8, 1987 has not been reported. It is reproduced in the Appendix hereto at page 15a.

The opinion of the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division, dated August 26, 1986 is reported at 64 Bankr. 321, and is reproduced in the Appendix hereto at page 22a.

Additional orders and judgments relating to the case under review are cited in this petition and reproduced in the Appendix as appropriate.

JURISDICTION

Petitioner seeks review of a decision of the United States Court of Appeals for the Eleventh Circuit. A rehearing of the judgment and opinion dated May 18, 1988 was timely sought and denied on July 18, 1988 (See, Appendix p. 34a).

The jurisdiction of this Court to review the judgments of the Eleventh Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 304 of the Bankruptcy Code, Public L. No. 95-598, 92 Stat. 2560 (1978):

§ 304. *Cases ancillary to foreign proceedings.* (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—

(1) enjoin the commencement or continuation of—

(A) any action against—

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title [11 USCS §§ 101 et seq.];

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

STATEMENT OF THE CASE

A. Procedural and Factual Background

Heinz Guenter Kaussen ("Kaussen"), a resident and citizen of the Federal Republic of Germany ("West Germany"), died in April, 1985. At the time of his death, Kaussen owned substantial property in West Germany, Ireland, Canada, California and Georgia.

On May 30, 1985, Petitioner Edgardo L. Parungao ("Petitioner") moved the Probate Court of Fulton County, Georgia for an order that an alleged will of Kaussen dated January 19, 1962 be admitted to probate in solemn form. By consent appeal from the Probate Court to the Superior Court of Fulton County, Georgia, the Superior Court entered an order on July 17, 1985 admitting the will to probate in solemn form and ordered letters of administration with the will annexed be issued to Parungao upon his posting bond and taking the required oath. Parungao qualified immediately. Since the date of his appointment, Petitioner has performed his duties as a Georgia administrator.

Shortly after Kaussen's death, probate proceedings were commenced in the local court of Cologne. That court appointed an administrator who, after determining that the estate was insolvent, petitioned the court to commence bankruptcy proceedings. On January 24, 1986, the West German court in Cologne entered an Order of Adjudication finding that the Kaussen estate was insolvent. The court appointed Respondent Klaus Hubert Goerg ("Respondent") to serve as bankruptcy trustee and authorized him to take possession of Kaussen's property in West Germany, as well as those assets located abroad. The adjudication of bankruptcy and the appointment of Respondent as bankruptcy trustee were affirmed by the Cologne Regional Court and the Cologne Higher Court of Appeals. The Higher Court of Appeals specifically held that "[i]n addition to the domestic property, the Debtor's

bankrupt estate shall further include the Debtor's property located abroad. The latter, too, shall be placed in custody and used by the Trustee."

Though considerable dispute exists regarding the state of his affairs, a preliminary investigation indicated that, at the time of his death, Kaussen's liabilities exceeded his assets by approximately $55 million. Kaussen's business was headquartered in Cologne, West Germany and many of his creditors are located in West Germany as well as in the several jurisdictions where his properties are located. Though not involved in this appeal, it should be noted that other probate proceedings were commenced in California and Canada, jurisdictions outside West Germany where Kaussen owned real and personal property.[1]

In June 1986, Respondent filed a petition pursuant to 11 U.S.C. § 304 in the United States Bankruptcy Court for the Northern District of Georgia, seeking to enjoin Petitioner from prosecuting the Fulton County probate proceeding as the Georgia administrator and to require that the Georgia property be turned over to him for distribution in the West German proceeding. Based upon its interpretation of the language of § 304 and pertinent definitional sections of the United States Bankruptcy Code, the bankruptcy court dismissed the petition. The bankruptcy court held that its jurisdiction to entertain a § 304 petition for ancillary administration of a foreign proceeding was limited to cases in which the subject of the foreign insolvency proceeding qualified as a "debtor" as that term is defined in the Bankruptcy Code. The bankruptcy court then concluded that the insolvent decedent's estate did not qualify as a "debtor" under the Code. Accordingly, the bankruptcy court dismissed Respondent's

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[1] A probate proceeding is presently pending in California. There, the United States Bankruptcy Court for the Northern District of California dismissed the German Representative's § 304 petition and no appeal was taken. The order dismissing the petition is contained in the Appendix at page 36a.

petition for lack of subject matter jurisdiction. See, Appendix, p. 22a for the complete text of "the Bankruptcy Court's decision.").

Goerg appealed the Bankruptcy Court's decision to the United States District Court for the Northern District of Georgia. The District Court affirmed the conclusion of the bankruptcy court that it could not exercise jurisdiction over the Kaussen estate because section 304 does not provide for subject matter jurisdiction over an insolvent foreign decedent's estate. (See, Appendix, p. 15a for the complete text of "the District Court's decision.").

Respondent then appealed to the United States Court of Appeals for the Eleventh Circuit. Recognizing the issue as one of first impression, the Eleventh Circuit reversed the courts below and remanded with instructions that the bankruptcy court entertain the § 304 petition. (See, Appendix, p. 1a for the complete text of the Eleventh Circuit's decision.) While holding that a domestic "decedent's estate" cannot be a "debtor" under Title 11, the Eleventh Circuit held that a foreign decedent's estate need not meet the definition of "debtor" to qualify for United States Bankruptcy Court ancillary administration. Review of the Eleventh Circuit's decision is sought here.

B. Basis for Federal Jurisdiction

Jurisdiction of the Eleventh Circuit to consider the appeal from the District Court is conferred by 28 U.S.C. § 158(d).

Jurisdiction of the District Court to consider the appeal from the Bankruptcy Court is conferred by 28 U.S.C. § 158(a).

Petitioner contends that no provision of law gives the District Court or the Bankruptcy Court original jurisdiction to hear the proceeding brought by the Respondent.

REASONS FOR ISSUING THE WRIT OF CERTIORARI

Since the founding of this country, the general jurisdiction over probate matters and the authority to control the property of a decedent's estate has been exclusively vested in the judiciaries of the various states. As this Court stated in *Markham v. Allen*, 326 U.S. 490, 494, 66 S.Ct. 296, 298, 90 L.Ed. 256, 259 (1945), "the reason [is] that the equity jurisdiction conferred by the Judiciary Act of 1789 and § 24(1) of the Judicial Code, which is that of the English Court of Chancery in 1789, did not extend to probate matters." In the ensuing two hundred years this fundamental jurisdictional precept has been recognized and adhered to by the federal courts. *Id.*; *Harris v. Zion's Bank Co.*, 317 U.S. 447, 450, 63 S.Ct. 354, 356, 87 L.Ed. 390 (1943); *Sutton v. English*, 246 U.S. 199, 207, 38 S.Ct. 254, 257, 62 L.Ed. 644 (1918); *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33, 43, 30 S.Ct. 10, 12, 54 L.Ed. 80, 84 (1909); *Farrell v. O'Brien*, 199 U.S. 89, 101, 25 S.Ct. 727, 730, 50 L.Ed. 101 (1905).

More particularly, it has long been recognized that the fundamental goals and objectives of the federal bankruptcy laws do not require the extension of bankruptcy jurisdiction to include the administration of probate proceedings. As stated in *In re Estate of Hiller*, 240 F. Supp. 504, 504 (N.D.Cal. 1965):

> The purposes of bankruptcy are two-fold: (1) to enable the debtor to get a fresh start in his financial affairs by relieving him of the burden of his unpaid debts; and (2) to provide for an equitable distribution of the debtor's assets among his creditors. [Citations omitted]. Such purposes do not require the application of bankruptcy proceedings to estates of deceased persons.

With the enactment of the current Bankruptcy Code in 1978, 11 U.S.C. § 101 *et seq.*, Congress intended to continue the exclusion of proabte matters from the jurisdic-

tion of bankruptcy courts. (For commentary in this regard, see 2, *Collier on Bankruptcy*, ¶ 304.1, at pp. 304-12 to -14 (15th ed. Supp. June 1985).)

Despite this clear and long standing precedent to the contrary, the decision of the Eleventh Circuit that is the subject of this petition has, for the first time, extended the jurisdiction of the federal judiciary to include the power to administer the assets of a decedent's estate. In essence, the Eleventh Circuit has held that § 304 of the Bankruptcy Code confers jurisdiction to bankruptcy courts to administer the United States assets of a foreign decedent. This Court should grant this petition for the following reasons:

(1) The decision of the Eleventh Circuit is contrary to the apparent intent of Congress in enacting § 304 of the Bankruptcy Code.

(2) The decision of the Eleventh Circuit is a significant departure from the well established procedure in this country regarding the administration of decedents' estates and probate jurisdiction.

(3) The decision of the Eleventh Circuit concerns an important federal question having profound precedential implications.

It should also be noted that this is a case of first impression and, given the importance of the underlying issue, it merits review by this Court.

I. The Decision Of The Eleventh Circuit Is Contrary To The Apparent Intent Of Congress In Enacting § 304 Of The Bankruptcy Code.

A straightforward analysis of the relevant statutory language provides clear evidence of Congress' intent in enacting § 304 of the Bankruptcy Code. It is apparent that Congress did *not* intend to abandon well established jurisdictional boundaries by expanding the jurisdiction of the bankruptcy court to include the administration of

foreign decedents' estates. The precise and unambiguous statutory language indicates that Congress did intend to continue to exclude decedents' estates from bankruptcy jurisdiction by requiring the existence of a "debtor" in order to file a petition pursuant to § 304 of the Bankruptcy Code.

In pertinent part, § 304 provides for the commencement and administration of "cases ancillary to foreign proceedings" as follows:

> (a) A case ancillary to a *foreign proceeding* is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
>
> (b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—
>
> (1) enjoin the commencement or continuation of—
>
> (A) any action against—
>
> (i) a *debtor* with respect to property involved in such foreign proceeding; or
>
> (ii) such property; or
>
> (B) the enforcement of any judgment against *the debtor* with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
>
> (2) order turnover of the property of such estate or the proceeds of such property, to such foreign representative; or
>
> (3) order other appropriate relief.

(Emphasis added.) 11 U.S.C. § 304(a) and (b).

In 11 U.S.C. § 101, a "foreign proceeding" is defined as follows:

> [a] proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which *the debtor's* domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization;

Importantly, both § 304 and § 101(22) require or, at the very least, presuppose the existence of a "debtor" as a necessary condition of standing for the filing of a petition pursuant to § 304.

The Bankruptcy Code defines "debtor" as a "person or municipality concerning which a case under this title has been commenced," 11 U.S.C. § 101(12), and defines a "person" as including "individual, partnership, and corporation, but does not include governmental unit." 11 U.S.C. § 101(35). Bankruptcy courts have consistently held that the representative of a decedent's estate is not a "debtor." *See, e.g., In re Estate of Patterson*, 64 Bankr. 807 (Bankr. W.D.Tex. 1986); *In re Estate of Whiteside by Whiteside*, 64 Bankr. 99 (Bankr. E.D.Cal. 1986); *Matter of 299 Jack-Hemp Associates*, 20 Bankr. 412 (Bankr. S.D.N.Y. 1982); *Matter of Jarrett*, 19 Bankr. 413 (Bankr. M.D.N.C. 1982); *In re Estate of Brown*, 16 Bankr. 128 (Bankr. D.D.C. 1981). Additionally, the legislative history of the Bankruptcy Code makes it clear that "[t]he definition [of person] does not include an estate or a trust," H.R. Rep. No. 595, 95th Cong., 2d Sess. 318, *reprinted in*, 1978 U.S. Code Cong. & Admin. News 5963, 6720; S. Rep. No. 989, 95th Cong., 2d Sess. 25, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5811. Hence, it is evident that only a "debtor" may invoke the jurisdiction of a bankruptcy court by filing a § 304 Petition. Because a decendent's estate is *not* included within the definition

of "debtor," it is readily apparent that Congress did not intend to expand the scope of bankruptcy jurisdiction to include the administration of the United States assets of a foreign decedent's estate.

This straighforward analysis has been embraced by the commentators. As *Collier* explains:

> [T]hat a foreign administration of a decedent's estate *is not* a "foreign proceeding" under section 101 is suggested by the fact that both sections 101 and 304 refer to a "debtor," which the Code defines to mean a person or municipality, and a "person" under the Code does not include a decedent's estate. And at least one court has held that the threshold prerequisites for application of section 304 include a showing that the foreign debtor could be a debtor under section 109(a) of the Code. Moreover, that Congress could have intended to exclude American decedents' estates from the protection of the Bankruptcy Code while extending that protection to foreign decedents' estates is a questionable proposition. It may also be significant that the Uniform Probate Code, which the Commission deemed adequate to cover domestic administration of insolvent decedents' estates, provides for "ancillary administration" by "foreign personal representatives." [emphasis in original].

(footnotes omitted). 2, *Collier on Bankruptcy*, ¶ 304.1, at pp. 304-13 to -14 (15th ed. Supp. June 1985).

Despite this very clear and simple rationale, the Eleventh Circuit has reached the opposite conclusion by holding that the Respondent, the representative of a foreign decedent's estate, may invoke the jurisdiction of the bankruptcy court by filing a § 304 Petition. While the Eleventh Circuit correctly concluded (as had the bankruptcy court and the district court) that the term "debtor" as used in the Bankruptcy Code does not include a decedent's estate, the court determined that Congress did not intend the absence of a "debtor" to pre-

clude the bankruptcy court from exercising jurisdiction over the assets of the Kaussen estate in Georgia.

In seeking to divine the intent of Congress, the Eleventh Circuit relied upon the legislative history of § 304. Quoting from *Cunard Steamship Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 454 (2d Cir. 1985), the Eleventh Circuit noted:

> Section 304, which was enacted as part of the Bankruptcy Reform Act of 1978 and which had no predecessor in prior law, "was intended to deal with the complex and increasingly important problems involving the legal effect the United States courts will give to foreign bankruptcy proceedings." [citations omitted.]

Goerg v. Parungao (In re Goerg), 844 F.2d. 1562, 1568 (11th Cir. 1988). In analyzing this historical background, the Eleventh Circuit failed to make a critical distinction. In enacting § 304, Congress was addressing a void in United States law regarding the ancillary administration of foreign *bankruptcy* proceedings, *not* a void in the laws of the states regarding the administration of the assets of a foreign decedent's estate. At the time of the enactment of § 304, there existed well developed procedures for the ancillary administration of foreign decedents' estates, *see*, Uniform Probate Code, Art. IV, yet there was no provision, state or federal, for ancillary administration of foreign bankruptcies. Hence, it is evident that § 304 was the result of Congressional concern regarding a void in traditional bankruptcy jurisdiction and was not intended to alter traditional probate jurisdiction.

Further, it seems highly unlikely that Congress intended to divest the states of their previously exclusive probate jurisdiction without expressly addressing the issue. This is especially evident in light of Congress' efforts in the wake of *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), to limit bankruptcy jurisdiction and to

provide for state court resolution of proceedings based upon state law claims or state law causes of action related to a case under Title 11. In fact, Congress has clearly mandated that ". . . the district court *shall* abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction." 28 U.S.C. § 1334. The Eleventh Circuit's conclusion that Congress intended to disturb or divest state probate court jurisdiction over ancillary administration of foreign decedents' estates is obviously inconsistent with this clear Congressional interest in preserving established State fora to adjudicate established state law issues.

Finally, as the district court noted, "[i]t seems unlikely that Congress would exclude American decedent's estates from the bankruptcy code but allow foreign decedent's estates to be protected." (See District Court's Order, Appendix, p. 15a at 19a.) However, the Eleventh Circuit's decision leads to this illogical result.

The straightforward language of Title 11 precludes the bankruptcy court from exercising jurisdiction over a decedent's estate. Importantly, such a result would assist, rather than hinder, the orderly administration of the Kaussen estate. Further, the Eleventh Circuit's decision substantively alters the traditional limits upon bankruptcy jurisdiction and, rather than simplifying ancillary administration, opens a "Pandora's box" of unsolved procedural and substantive issues. Considering the practical effect of the decision, see, Section II, *infra*, it seems obvious that, rather than fulfilling Congressional intent, the result reached by the Eleventh Circuit frustrates it. This Court should not let that decision stand without careful review.

II. The Decision Of The Eleventh Circuit Is A Significant Departure From The Well Established Procedure In This Country Regarding The Administration Of Decedents' Estates And Probate Jurisdiction.

This Court has long recognized that the federal courts may not "interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court." *Markham v. Allen*, *supra*, 326 U.S. at 494, 66 S.Ct. at 298, 90 L.Ed. at 259 (1945). Consequently, the various states have deveolped intricate and workable rules governing the administration and probate of decedent's estates. Conversely, there are no clear guidelines, rules or statutes upon which a bankruptcy court may rely in administering the assets of a foreign decedent. It is evident that the Eleventh Circuit's conclusion that bankruptcy jurisdiction extends to the administration of a foreign decedent's estate "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." U.S. Sup. Ct. Rule 17, 28 U.S.C.

Not only does the Eleventh Circuit decision significantly alter the traditional notions regarding probate jurisdiction, it is contrary to the efficient administration of justice. Under the Eleventh Circuit's rationale, bankruptcy courts will be required to address numerous issues far beyond the traditional bounds of their subject matter jurisdiction. Yet, each of the fundamental issues regarding the disposition of the assets of the Kaussen estate located in this country are *specifically* addressed by the probate laws of the various states. In most states, statutory provisions expressly address conflicts of law issues; the ancillary administration of foreign decedents' estates; and, the distribution of the assets of an insolvent estate.

In Georgia, for example, title to a decendent's real property immediately vests in the heirs at law (or devisees under a valid will) at the instant of the decedent's

death. The decedent's personal property is, however, subject to administration for the benefit of creditors by the decedent's legal representative. All other property owned by the decedent vests in the administrator (or executor) of his estate for the benefit of heirs and creditors. O.C.G.A. § 53-4-8. Furthermore, under Georgia law, the validity of a provision of a foreign will passing title to real property located in Georgia is determined by application of Georgia law. O.C.G.A. § 53-3-42; *Gibson v. Gaines*, 46 Ga.App. 458, 167 S.E. 782 (1933). The validity of the devise of personality located in Georgia is governed by the laws of the country or state in which the testator was a resident at the time of his death. O.C.G.A. § 53-3-43; *Blackwell v. Grant*, 46 Ga.App. 241, 167 S.E. 333 (1933). Finally, in the event that the estate is insolvent, there are well developed rules determining the nature and priority of the distribution of the decedent's assets to his creditors and heirs. *See e.g.*, O.C.G.A. §§ 53-4-1 to -54, 5-1 to -21, 7-70 to -107; see also, Uniform Probate Code, §§ 2-101 to -404, 2-601 to -902, 3-801 to -816, 3-901 to -916, 4-101 to -401. The Eleventh Circuit's decision to usurp or preempt the jurisdiction of the state courts, who work within these clear guidelines, in favor of bankruptcy courts, who have no rules to look to for guidance, is such a departure from the well established judicial approach to the administration of decedents' estates that it certainly requires review by this Court.

Despite the fact that the Kaussen estate has been found to be insolvent by a West German court, it remains a decedent's estate. Merely declaring the decedent's estate insolvent and titling the proceeding a "bankruptcy" does not alter its fundamental character. To require abandonment of well established procedural and substantive guidelines formulated and administered by state probate courts in favor of a previously unknown and presently untested proceeding in the bankruptcy court seemingly defies logic.

If the decision of the Eleventh Circuit is not reversed, then it seems that separate proceedings must be filed in bankruptcy courts in each of the states where property of the decedent is located (i.e., Georgia and California). 28 U.S.C. § 1410 (venue of cases ancillary to foreign proceedings). Each of these courts will be required to determine such fundamental issues as whether West German law or the various states' laws control the disposition of the United States assets of the Kaussen estate. In addition to resolving the differences between West Germany and the United States, each of the bankruptcy courts will be required to resolve inconsistences between the federal bankruptcy laws and state probate laws. While § 304(c)(4) may be read as requiring that proceeds of a foreign decedent's estate be distributed in accordance with the priorities established by bankruptcy law, state laws have separate rules for distribution. These differences in such critical areas make an ancillary administration of a decedent's estate in the bankruptcy court practically infeasible. For example, the issues of year's support, lien priorities, administrative expenses, etc., are virtually irreconcilable within the context of these two competing sets of priorities and rules of distribution governing the various parties' rights in the assets of the estate.

The mischief of such a result is emphasized by the practical realization that an administration of the Kaussen estate by the bankruptcy court serves no real purpose. It does not result in judicial economy and most of the critical questions associated with the administration of the estate will be resolved with each decision being one of first impression. Hence, rather than promoting the orderly administration of this estate, the Eleventh Circuit's decision compounds the complexity of this action.

This Court has made it clear that the federal courts should scrupulously confine their own jurisdiction to the precise limits which have been defined by statute, with due regard for the rightful independence of state gov-

ernments. *See, e.g., City of Indianapolis v. Chase Nat. Bank of City of New York*, 314 U.S. 63, 62 S.Ct. 15, 76-77, 86 L.Ed. 47, 54 (1941), rehearing denied *Chase Nat. Bank of City of New York v. Indianapolis Gas Co.*, 314 U.S. 714, 62 S.Ct. 355, 86 L.Ed. 569, and three cases 314 U.S. 714, 62 S.Ct. 356, 86 L.Ed. 569; *Healy v. Ratta*, 292 U.S. 263, 270, 54 S.Ct. 700, 78 L.Ed. 1248, 1254 (1933). And, as pointed out above, in the wake of the *Marathon Pipeline* decision, supra, Congress clearly directed bankruptcy courts not to adjudicate state law claims related to cases under Title 11. *See*, 28 U.S.C. § 1334. The careful attention of this Court and of Congress to the interests of the various states in the adjudication of traditional state law issues is obviously inconsistent with the Eleventh Circuit's decision to disturb or divest state probate jurisdiction over the ancillary administration of foreign decedents' estates. Such a departure from long standing judicial practice and procedure requires review by this Court.

III. The Decision Of The Eleventh Circuit Concerns An Important Federal Question Having Profound Precedential Implications.

In determining whether to grant this petition, it is essential that this Court recognize that, absent reversal, the Eleventh Circuit's decision in this case may have a profound impact upon judicial administration in the United States. In short, it appears that the Eleventh Circuit may have opened the federal bankruptcy courts to *all* foreign decedents' estates. If the "foreign representative" does not have to be a "debtor" in order to file a § 304 Petition, then *any* representative of a foreign decedent's estate may be able to choose to invoke the jurisdiction of federal bankruptcy courts rather than proceeding with state probate administration.

If the Eleventh Circuit is correct that a party need not be a "debtor" in order to file a § 304 Petition, then the focus of the applicability of § 304 shifts to an inquiry

regarding the nature of the foreign proceeding. While the Eleventh Circuit has presumed that § 304 was intended to apply only to foreign insolvency proceedings, there is nothing in the Bankruptcy Code (or the legislative history of § 304) that supports this conclusion. To the contrary, the Bankruptcy Code definition of "foreign proceeding" expressly states that it is *not limited* to proceedings commenced pursuant to foreign bankruptcy law. 11 U.S.C. § 101(22). In essence, a "foreign proceeding" encompasses any foreign judicial or administrative proceeding "for the purpose of *liquidating an estate*, adjusting debts by composition, extension, or discharge, *or* effecting a reorganization." (Emphasis added.) *Id.* There is no requirement of insolvency.

Because the very essence of probate is "the liquidation of an estate," it follows that *any* foreign probate proceeding falls within the definition of "foreign proceeding." Consequently, if the Eleventh Circuit's conclusion that a "debtor" is not required for a proceeding pursuant to § 304 is correct, then it seems that *any* representative of a foreign decedent's estate may invoke the jurisdiction of the federal bankruptcy court.

If this assertion is correct, then the decision of the Eleventh Circuit has potentially rendered meaningless the well developed state laws regarding the administration of foreign decedents' estates while, at the same time, creating federal probate jurisdiction over the United States assets of foreign decedents. The far reaching implications of such a result merit review by this Court.

CONCLUSION

By concluding that a foreign decedent's estate may invoke the jurisdiction of federal bankruptcy courts, the Eleventh Circuit has extended federal jurisdiction far beyond well established limits. The decision is contrary to the intent of Congress in enacting § 304 of the United States Bankruptcy Code. Further, the decision represents

a significant departure from the traditional distinctions between the roles of federal and state judiciaries in probate matters. Finally, the precedential implications of the Eleventh Circuit's decision are profound in that any foreign decedent's estate might seek to have the United States assets of the estate administered by bankruptcy courts. For each of these reasons, this Court should review the Eleventh Circuit's decision.

WHEREFORE, Petitioner Edgardo L. Parungao prays that this Petition be granted and a writ of certiorari be issued.

Respectfully submitted,

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APPENDIX

APPENDIX
TABLE OF CONTENTS

Page

(i) Reprinted copies of the opinions delivered upon the rendering of the judgments sought to be reviewed

Goerg v. Parungao (In re Goerg), 844 F.2d 1562 (11th Cir. May 18, 1988) (No. 87-8161) 1a

(ii) Reprinted copies of other opinions and orders in the case

In re Goerg, No. C-86-2096-A, slip op. (N.D.Ga. January 8, 1987) (Judgment attached) 15a

Matter of Goerg, 64 Bankr. 321 (Bankr. N.D. Ga. August 26, 1986) 22a

(iii) Reprinted copies of the judgments sought to be reviewed and of the order on rehearing

Goerg v. Parungao (In re Goerg), No. 87-8161, Judgment (11th Cir. May 18, 1988) 32a

Goerg v. Parungao (In re Goerg), No. 87-8161 (11th Cir. July 18, 1988) (Order denying Petition for Rehearing and Suggestion for Rehearing En Banc) 34a

(iv) Other appended material

In re Gorg [sic], No. 3-86-01940JR, slip op. (Bankr. N.D. Cal. August 15, 1986) 36a

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 87-8161

IN RE KLAUS HUBERT GOERG,
Debtor.

KLAUS HUBERT GOERG,
Plaintiff-Appellant,

v.

EDGARDO L. PARUNGAO,
Defendant-Appellee.

May 18, 1988

Appeal from the United States District Court
for the Northern District of Georgia

Before RONEY, Chief Judge, TJOFLAT, Circuit Judge, and CLEMON,* District Judge.

TJOFLAT, Circuit Judge:

This appeal presents a question of first impression for this court: whether section 304 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330, opens United States bankruptcy

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* Honorable U.W. Clemon, U.S. District Judge for the Northern District of Alabama, sitting by designation.

courts to proceedings ancillary to foreign insolvency proceedings where the entity that is the subject of the foreign proceeding qualifies for insolvency administration under foreign law, but does not fall within the Bankruptcy Code's definition of "debtor." Both the bankruptcy court and the district court in this case answered the question in the negative, holding that a West German bankruptcy trustee was precluded from commencing a section 304 ancillary case because the debtor in the foreign case—an insolvent decedent's estate—did not qualify as a "debtor" under the Bankruptcy Code. We conclude that the courts below misconstrued the eligibility requirements for section 304 relief, and we accordingly reverse.

I.

Heinz Guenter Kaussen, a resident and citizen of the Federal Republic of Germany (West Germany), died in April 1985 owning substantial property in both Europe and North America. Although most of his holdings were located in West Germany, he also owned property in Canada, Ireland, California, and Georgia. At the time of his death, his liabilities exceeded the value of his assets by some $55 million. His business enterprises had been headquartered in Cologne, West Germany, and the vast majority of the estate's creditors are located in West Germany.

Shortly after Kaussen's death, probate proceedings were commenced in the local court of Cologne. That court appointed an administrator who, after determining that the estate was insolvent, petitioned the court to commence bankruptcy proceedings.[1] On January 24, 1986, the court

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[1] West German law, like the law in many other foreign countries, permits bankruptcy proceedings to be brought with respect to insolvent decedents' estates. *See* Klocker, *Foreign Debtors and Creditors Under United States and West German Bankruptcy Laws: An Analysis and Comparison*, 20 Texas Int'l L.J. 55, 90 & n. 223 (1985); Nadelmann, *Insolvent Decedents' Estates*, 49 Mich.L.Rev. 1129, 1129 (1951).

entered an Order of Adjudication, finding that the estate was insolvent. The court appointed Klaus Hubert Goerg, appellant here, to serve as the bankruptcy trustee and authorized him to take possession of the decedent's property both in Germany and abroad. The adjudication of bankruptcy and the appointment of Goerg as trustee were affirmed by the Cologne Regional Court and the Cologne Higher Court of Appeals. The Higher Court of Appeals specifically held that "[i]n addition to the domestic property, the Debtor's bankruptcy estate shall further include the Debtor's property located abroad. The latter, too, shall be placed in custody and used by the Trustee." [2]

Meanwhile, upon Kaussen's death, the Probate Court of Fulton County, Georgia has appointed Edgardo L. Parungao, appellee here, to serve as administrator of the Kaussen estate assets located in Georgia.[3] In June 1986, Goerg filed a petition pursuant to 11 U.S.C. § 304 (1982) in the United States Bankruptcy Court for the Northern District of Georgia, seeking to enjoin Parungao from prosecuting the Fulton County probate proceeding.[4] Under section 304, a United States bankruptcy court may, upon petition by the official representative of a foreign bankrupt in a foreign insolvency proceeding, enter an order staying the commencement or continuation of any action in the United States against property involved in the for-

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[2] Appellant represents, and appellee does not dispute, that the Cologne Higher Regional Court of Appeals is the highest court of review with respect to matters involving insolvent decedents' estates.

[3] Under Georgia law, the probate court of the county in which a nonresident decedent's real property is located has jurisdiction over the administration of that property. *See Hungerford v. Spalding*, 183 Ga. 547, 189 S.E. 2, 3 (1936).

[4] The bankruptcy court reported that "[u]nder a settlement approved by Superior Court of Fulton County, Georgia and the Probate Court of Fulton County, Georgia, distributions from the estate are to be paid 20% to each of Kaussen's four children and Mrs. Ingelborg Skowronek, mother of the children and Kaussen's lifetime companion."

eign proceeding. *Id.* § 304(b)(1)(A). The bankruptcy court may also stay the enforcement of any lien or judgment obtained against such property, *id.* § 304(b)(1)(B), and may order that such property be turned over for administration by the foreign court in which the principal bankruptcy case is pending. *Id.* § 304(b)(2). Finally, the bankruptcy court may order other relief deemed "appropriate." *Id.* § 304(b)(3). In his section 304 petition, Goerg requested the bankruptcy court to order that the Georgia property be turned over to him for distribution in the West German bankruptcy proceeding.

Based on its interpretation of the language of section 304 and the pertinent definitional sections, the bankruptcy court held that its jurisdiction to entertain section 304 petitions was limited to cases in which the subject of the foreign insolvency proceeding qualified as a "debtor" as that term is defined in the Bankruptcy Code. The bankruptcy court then concluded that an insolvent decendent's estate—the debtor in the foreign insolvency proceeding in this case—did not qualify as a "debtor" under the Code. Accordingly, the bankruptcy court dismissed Goerg's section 304 petition for lack of subject matter jurisdiction.[5]

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[5] Although it felt compelled by the statutory language to dismiss the petition, the bankruptcy court expressed dismay at the outcome:

> Here we have German nationals [i.e., Mrs. Skowronek and Kaussen's four children, *see supra* note 4] who have lost their appeals to assert their interests in Kaussen's estate in the Courts of the Federal Republic of Germany, turning to the probate laws of the State of Georgia. In Georgia, they will receive what they could not from their own home courts. . . . As the facts now appear before the Court, this is mainly a contest between the German bankruptcy trustee and Kaussen's heirs. The heirs have lost in their own home courts and are now pursuing their claims in a more favorable forum, to wit: the Probate Court of Fulton County, Georgia. It does seem to be a great affront to the principles of comity to allow this to occur.

64 BR 321. The district court affirmed, and Goerg now appeals.

II.

Section 304 provides as follows:

> (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
>
> (b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—
>
> (1) enjoin the commencement or continuation of—
>
> (A) any action against—
>
> (i) a debtor with respect to property involved in such foreign proceeding; or
>
> (ii) such property; or
>
> (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
>
> (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
>
> (3) order other appropriate relief.
>
> (c) In determining whether to grant relief under subsection (b) of this section, the court shall be

guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 304 (1982).

In holding that it lacked jurisdiction to entertain Goerg's section 304 petition, the bankruptcy court engaged in the following analysis. First, it looked to the Code's definition of "foreign proceeding":

> "[F]oreign proceeding" means proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

Id. § 101(22) (Supp. IV 1986). Because the definition of "foreign proceeding" makes reference to "the *debtor's*

domicile, residence, principal place of business, or principal assets," the bankruptcy court concluded that its jurisdiction to entertain section 304 petitions was limited to cases in which the subject of the foreign proceeding qualified as a "debtor" under the Code.[6] The Code defines a "debtor" as a "person or municipality concerning which a case under this title has been commenced." *Id.* § 101(12) (1982). "Person," under the Code, "includes individual, partnership, and corporation, but does not include governmental unit." *Id.* § 101(35) (Supp. IV 1986). The bankruptcy court held that an insolvent decedent's estate is not a "person," and therefore not a "debtor," and that the court was consequently without jurisdiction to entertain Goerg's petition.

In evaluating the correctness of the bankruptcy court's ruling, our first task is to determine whether, as a general matter, the Code's definition of "debtor" excludes insolvent decedents' estates. If we conclude that it does, our task will then be to decide whether that exclusion applies in the context of a section 304 ancillary proceeding.

Before we begin our analysis, we note that Congress has the *power* to create bankruptcy jurisdiction over the administration of decedents' estates. U.S. Const. art. I, § 8, cl. 4.[7] Care should be taken not to confuse the question of the breadth of Congress' bankruptcy power with the so-called "probate exception" to statutory diversity jurisdiction. That exception relates only to 28 U.S.C.

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[6] As support for its holding, the bankruptcy court cited *Angulo v. Kedzep Ltd.*, 29 B.R. 417 (S.D.Tex. 1983). In the course of discussing whether the foreign representative in that case had met the threshold prerequisites for application of section 304, the *Angulo* court stated that the foreign debtor "could be a debtor under Chapter 11." *Id.* at 418.

[7] Clause 4 provides that Congress shall have power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

§ 1332 (1982),[8] and has no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases. *Cf. Covell v. Heyman*, 111 U.S. 176, 179-80, 4 S.Ct. 355, 357, 28 L.Ed. 390 (1884) (property in custody of state court may be disturbed by federal court "exercis[ing] jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States"). Owing to the supremacy clause, federal bankruptcy law preempts state law; as one of Congress' enumerated powers, the power to enact bankruptcy laws is limited only by the substantive guarantees contained in the Constitution. *Cf. Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589, 601-02, 55 S.Ct. 854, 863, 869, 79 L.Ed. 1593 (1935). Whether Congress has actually exercised its bankruptcy power in a particular area is, of course, a matter of statutory construction.

Having said that, we turn to the question whether the Code's definition of "debtor" excludes decedents' estates. As the bankruptcy court correctly observed, the term "debtor" as defined by the Code means "person or municipality," and the term "person" "includes individual, partnership and corporation, but does not include governmental unit." Notably, the Code does not *exclude* decedents' estates from the definition of "person"; Congress' use of the word "includes" in the definition of "person" means that the definition is not limiting. *See* 11 U.S.C. § 102(3) (1982) (rules of construction).

Nevertheless, we find two indicia that Congress intended to exclude insolvent decedents' estates from the definition of "person." First, Congress defined "entity" to include "person, estate, trust, governmental unit, and

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[8] The "probate exception" was developed at a time when the diversity statute granted jurisdiction over "suits of a civil nature in law or equity." Probate matters were deemed not to fit this description because such actions would have been heard in the ecclesiastical courts. *See* C. Wright, Law of Federal Courts § 25, at 143-46 (4th ed. 1983).

United States trustee." *Id.* § 101(14) (Supp. IV 1986). If Congress had intended "person" to include "estate," there would have been no reason to list "estate" separately in the definition of "entity." Second, the legislative history expressly states that "[t]he definition [of person] does not include an estate or a trust." H.R. Rep. No. 595, 95th Cong., 2d Sess. 313, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6270; S. Rep. No. 989, 95th Cong., 2d Sess. 25, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5811.

Based on these indicia, we conclude that the Code's definition of "person," and therefore its definition of "debtor," excludes insolvent decedents' estates. Other courts that have addressed this question have uniformly embraced this view. *See In re Estate of Whiteside*, 64 B.R. 99, 102 (Bankr. E.D. Cal. 1986); *In re Estate of Patterson*, 64 B.R. 807, 808 (Bankr. W.D. Tex. 1986); *In re Jarrett*, 19 B.R. 413, 414 (Bankr. M.D. N.C. 1982); *In re 299 Jack-Hemp Assocs.*, 20 B.R. 412, 413 (Bankr. S.D.N.Y. 1982); *In re Estate of Brown*, 16 B.R. 128, 128 (Bankr. D.D.C. 1981).[9] These courts generally have opined that Congress elected not to extend bankruptcy jurisdiction to insolvent decedents' estates because the individual states have developed, through their probate systems, a comprehensive and specialized machinery for the administration of such estates. *See Jarrett*, 19 B.R. at 414, *299 Jack-Hemp Assocs.*, 20 B.R.

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[9] Courts addressing the issue under the predecessor of the current Bankruptcy Code, the 1898 Bankruptcy Act, reached the same conclusion. *See In re Estate of Hiller*, 240 F.Supp. 504, 504 (N.D. Cal. 1965); *In re Morgan*, 26 F.2d 90, 91 (D.Mass. 1928); *In re Fackelman*, 248 F. 565, 568 (S.D.Cal. 1918); *see also Adams v. Terrell*, 4 F. 796, 801 (W.D.Tex. 1880) (interpreting predecessor of 1898 Act). During the process leading to the enactment of the present Bankruptcy Code, the Commission on the Bankruptcy Laws recommended that the traditional exclusion of decedents' estates be continued. *See* H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. I, at 185 (1973).

at 413. Some of the courts have also noted that the policy of the Bankruptcy Code is to give individuals a "fresh start" through discharge of their debts, and that this policy is not furthered by bankruptcy administration of decedents' estates. *See Jarrett*, 19 B.R. at 414; *cf. In re Estate of Hiller*, 240 F. Supp. 504, 504 (N.D. Cal. 1965) (interpreting 1898 Bankruptcy Act); *Adams v. Terrel*, 4 F. 796, 801 (W.D. Tex. 1880) (in the case of an insolvent decedent's estate, "death has already discharged [the decedent] of all personal liability").

As we indicated above, however, our conclusion that the Code's definition of "debtor" excludes decedents' estates does not end our inquiry: we must now determine whether that exclusion applies in the context of a proceeding ancillary to a foreign proceeding pursuant to section 304. As the bankruptcy court emphasized, the Code's definition of "foreign proceeding" does make reference to "the debtor."[10] However, that same definition states that "'foreign proceeding' means proceeding . . . *whether or not under bankruptcy law* . . . for the purpose of *liquidating an estate*, adjusting debts by composition, extension, or discharge, or effecting a reorganization." 11 U.S.C. § 101(22) (Supp. IV 1986) (emphasis added). Thus, we are presented with an anomaly: although the inclusion of the term "debtor" in the definition of "foreign proceeding" suggests that the subject of the foreign proceeding must qualify as a "debtor" under United States bankruptcy law, the Code expressly provides that the foreign proceeding need not even be a bankruptcy proceeding, either under foreign or United States law. Moreover, "foreign proceeding" includes a proceeding "for the purpose of liquidating an estate"[11]—

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[10] We note that the text of section 304 itself also contains the term "debtor."

[11] The term "estate" is not defined in the definitional section of the Bankruptcy Code. The Code does use the term of art "property of the state" to describe "all legal or equitable interests of the

yet, as we have seen, a decedent's estate does not qualify as a "debtor" under United States bankruptcy law.

The anomaly created by the inclusion of the term "debtor" in the otherwise expansive definition of "foreign proceeding" could be resolved in either one of two ways. First, we could adopt the position taken by the bankruptcy court: that the Code's narrow definition of "debtor" controls, notwithstanding the otherwise expansive definition of "foreign proceeding." Alternatively, we could adopt the view that the term "debtor" as used in the section 304 context incorporates the definition of "debtor" used by the forum in which the foreign proceeding is pending. Under this alternative view, the bankruptcy court has jurisdiction to entertain the section 304 petition provided that the debtor qualifies for relief under applicable foreign law, and provided further that the foreign proceeding to which the debtor is subject is "for the purpose of liquidating an estate. adjusting debts by composition, extension, or discharge, or effecting a reorganization."

At first blush, the former view seems the more attractive of the two; the term "debtor" is expressly defined by the Code, and general principles of statutory construction require us to assume that Congress intended that the definition apply each time the term appears. However, it is also a well established canon of statutory con-

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debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1) (1982). However, the Code also uses the term "estate" in a sense that includes decedent's estates. *See id.* § 101(14) (Supp. IV 1986) (definition of "entity"). The use of the term "estate" in the definition of "foreign proceeding" is ambiguous, and could be interpreted as including insolvent decedent's estates, not just "estates" in the sense of the bankruptcy term of art "property of the estate." *See* 2 Collier on Bankruptcy ¶ 304.01, at 304-12 (15th ed. 1987) ("That a foreign administration of a decedent's estate is . . . a 'foreign proceeding' is suggested by the expansive language of [section 101(22)] which includes within its scope proceedings under laws other than bankruptcy laws brought for the purpose of liquidating an estate.").

struction that "[a] statute susceptible of more than one meaning must be read in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Schultz v. Louisiana Trailer Sales, Inc.*, 428 F.2d 61, 65 (5th Cir. 1970). Because we find that the question of debtor eligibility for section 304 ancillary assistance is susceptible of two interpretations, we turn to an examination of the purposes behind section 304.

Section 304, which was enacted as part of the Bankruptcy Reform Act of 1978 and which had no predecessor in prior law,[12] "was intended to deal with the complex and increasingly important problems involving the legal effect the United States courts will give to foreign bankruptcy proceedings." *Cunard Steamship Co. Ltd. v. Salen Reefer Servs. AB*, 773 F.2d 452, 454 (2d Cir. 1985); *see generally* Unger, *United States Recognition of Foreign Bankruptcies*, 19 Int'l Law. 1153 (1985). The filing of a section 304 petition does not commence a full bankruptcy case; a section 304 case is an ancillary case in which a United States bankruptcy court is authorized to apply its processes to give effect to orders entered in a foreign insolvency proceeding. Consistent with "[p]rinciples of international comity and respect for the judgments and laws of other nations," Congress intended that the bankruptcy courts have "maximum flexibility" in

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[12] *See* H.R. Doc. No. 137, 93d Cong., 1st Sess., pt. II, 69-71 (1973); *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 1443 (1976) (statement of Professor Kurt H. Nadelmann). Under section 2a(22) of the 1898 Bankruptcy Act, bankruptcy courts were authorized to "[e]xercise, withhold, or suspend the exercise of jurisdiction . . . where a bankrupt has been adjudged bankrupt by a court of competent jurisdiction without the United States." Although the 1898 Act did not provide a mechanism whereby a foreign bankruptcy trustee could initiate a proceeding in a United States bankruptcy court, some United States courts did defer to foreign insolvency administrations as a matter of comity. *See, e.g., Cornfeld v. Investors Overseas Servs., Ltd.*, 471 F.Supp. 1255, 1259 (S.D.N.Y.), *aff'd*, 614 F.2d 1286 (2d Cir. 1979).

fashioning appropriate orders. H.R. Rep. No. 595, 95th Cong., 2d Sess. 325, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6281. The ultimate purpose of the section 304 mechanism is to "prevent dismemberment by local creditors" of assets located in this country that are involved in a foreign insolvency proceeding. *Id.* at 324; S. Rep. No. 989, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S. Code & Admin. News 5787, 5821.

It is thus clear that Congress enacted section 304 to help further the efficiency of foreign insolvency proceedings involving worldwide assets. In aid of such proceedings, federal bankruptcy courts may, within the constraints imposed by section 304, apply their processes and expertise to marshall property of the foreign debtor's estate located in this country. Because the focus is on making United States processes available in aid of foreign proceedings, not actual bankruptcy administration, it would make little sense to require that the subject of the foreign proceeding qualify as a "debtor" under United States bankruptcy law. *See* Boshkoff, *United States Judicial Assistance in Cross-Border Insolvencies*, 36 Int'l & Comp. L.Q. 729, 740-41 (1987); Klocker, *Foreign Debtors and Creditors Under United States and West German Bankruptcy Laws: An Analysis and Comparison*, 20 Texas Int'l L.J. 55, 90 (1985). Indeed, in light of the comity concerns that induced Congress to enact section 304, it would make emient sense for Congress to define expansively the class of foreign insolvency proceedings for which ancillary assistance is available.

It bears emphasizing that a section 304 debtor does not receive the benefits of full bankruptcy administration under United States law. The legislative history expressly states that the filing of a section 304 petition "does not commence a full bankruptcy case." H.R. Rep. No. 595, 95th Cong., 2d Sess. 324, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6281; S. Rep. No. 989, 95th Cong., 2d Sess. 35, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5821. Thus, for example,

the debtor is not entitled to the automatic stay under 11 U.S.C. § 362 (1982), nor is the debtor entitled to a discharge of its debts upon completion of the section 304 proceeding. Indeed, the section 304 debtor may ultimately receive no relief at all; it is within the discretion of the bankruptcy court, guided by the factors enumerated in section 304(c), to determine what relief, if any, is appropriate. That the section 304 debtor is denied the two main benefits accorded the debtor in a full bankruptcy proceeding—automatic stay and discharge—strongly suggests that Congress did not intended that "debtor" eligibility under the Code be a prerequisite to section 304 ancillary assistance.[13]

In light of these considerations, we conclude that the debtor in a section 304 proceeding need not qualify as a "debtor" under the Code's definition of that term. Rather, the debtor need only be properly subject, under applicable foreign law, to a proceeding commenced "for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization." Because that condition is met in this case, we reverse and remand with instructions that the bankruptcy court entertain Goerg's section 304 petition.[14]

REVERSED and REMANDED.

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[13] This analysis suggests that a full bankruptcy proceeding involving a foreign debtor may be commenced only if the foreign debtor qualifies as a "debtor" under the Code *Cf.* 11 U.S.C. § 303 (b)(4) (1982).

[14] The record is not clear as to whether the bankruptcy court has passed on all issues relevant to its jurisdiction to entertain Goerg's section 304 petition. In addition to establishing debtor eligibility, the section 304 petition must establish (1) a foreign proceeding against the debtor, (2) a foreign representative entitled to file the petition, and (3) presence within the district of property involved in the foreign proceeding. *See In re Stuppel*, 17 B.R. 413 (S.D.Fla. 1981). On remand, the bankruptcy court should dismiss the petition unless it finds that each of these elements has been established.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil No. C-86-2096-A

IN RE: KLAUS HUBERT GOERG, Trustee in bankruptry under the laws of the Federal Republic of Germany for the estate of Heinz Guenter Kaussen,

Appellant

[Filed Jan. 8, 1987]

ORDER

This appeal is from the decision of the bankruptcy court finding that the bankruptcy court lacked subject matter jurisdiction in this case.

In April of 1985, Heinz Guenter Kaussen, a citizen of the Federal Republic of Germany, died. After determining that the estate was insolvent, the German probate administrator petitioned the Cologne local court to commence bankruptcy proceedings. On January 24, 1986, the Cologne court entered an Order of Adjudication findings that the estate was insolvent and appointing Klaus Hubert Goerg as bankruptcy trustee. Kaussen's estate is now being liquidated under the supervision of the Bankruptcy Division of the District Court of Cologne pursuant to section 215 of the Konkursordnung (the German Bankruptcy Act). Kaussen owned real and personal property located in Germany, Canada, Ireland, California, and Georgia. At the time of his death, Kaussen's liabilities exceeded the value of his assets by more than 55 million dollars. The vast majority of creditors of the estate are located in Germany where most of Kaussen's holdings are located.

The Cologne local court's Order of Adjudication giving Goerg authority to liquidate all of Kaussen's property both within Germany and abroad was affirmed by the Cologne Regional Court on February 17, 1986 and by the Cologne Higher Regional Court of Appeals on March 3, 1986 and April 28, 1986. The latter court is the highest court of review available under German law.

Pursuant to the Order of Adjudication and 11 U.S.C. § 304, Goerg filed proceedings in the bankruptcy court for the Northern District of Georgia to liquidate the assets located in this district. Concurrently with the bankruptcy proceedings in Germany, the Fulton County Probate Court appointed Edgardo L. Parungao as the administrator of Kaussen's assets located in Georgia. Parungao moved the bankruptcy court to dismiss Goerg's proceeding in that court on several grounds. The bankruptcy court granted Parungao's motion finding that it lacked jurisdiction over the subject matter.

Appellant Goerg appeals that decision of the bankruptcy court. Appellant contends that a foreign bankruptcy trustee is a foreign representative qualified to initiate a case ancillary to a foreign proceeding under 11 U.S.C. § 304, whether or not the foreign debtor was deceased at the time of the commencement of the foreign proceeding.

Although this appears to be a case of first impression in this circuit, the controlling issue has been dealt with by other courts and in the treatise *Collier on Bankruptcy*. 2 *Collier on Bankruptcy* ¶ 304.01 at 304-12 (15th ed. 1986). *See also Angulo v. Kedzep*, 29 Bankr. 417, 418 (Bankr. S.D. Tex. 1983). The controlling issue is "whether section 304 opens United States bankruptcy courts to proceedings ancillary to foreign administration under foreign law but not ordinarily qualifying for relief under the [Bankruptcy] Code." *Id.* at 304-11. Germany as well as many other foreign countries permit bankruptcy proceedings to be brought with respect to in-

solvent decedents' estates even if the petition for bankruptcy is filed after the decedent's death. United States bankruptcy laws, however, consistently have been construed not to cover bankruptcy proceedings initiated by representatives of decedents. *See, e.g., In re Estate of Hiller*, 240 F. Supp. 504 (N.D. Cal. 1965).

Section 304 of the Bankruptcy Code provides:

> (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
>
> (b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—
>
> (1) enjoin the commencement or continuation of—
>
> (A) any action against—
>
> (i) a *debtor* will respect to property involved in such foreign proceeding; or
>
> (ii) such property; or
>
> (B) the enforcement of any judgment against the *debtor* with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
>
> (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
>
> (3) order other appropriate relief.
>
> (c) In determining whether to grant relief under subsection (b) of this section, the court shall be

guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate:

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

An ancillary case may be brought only in connection with a foreign proceeding. Appellant urges this court to find that the foreign administration of a decedent's estate is a "foreign proceeding" as is required by section 304 and as that term is defined by 11 U.S.C. § 101(20) (Supp. 1986). The definition given in the statute for a "foreign proceeding" is a

proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the *debtor's* domicile, residence, principal place of business, or principal assets were located at the commencement of such proceedings for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

Id.

This court finds that the bankruptcy court properly concluded that section 304 requires a "debtor" before a court can exercise jurisdiction pursuant to that section. Debtor is defined in the Bankruptcy Code as a "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(12) (1982). The definition of "person" under the Code "includes individual, partnership, and corporation," but does not include a decedents' estate. 11 U.S.C. § 101(33) (Supp. 1986). Thus, the definition of debtor does not include a decedent's estate. *See, e.g., In re Jarrett*, 19 Bankr. 413 (Bankr. M.D.N.C. 1982); *In re Brown*, 16 Bankr. 128 (Bankr.D.D.C. 1981). For this reason, although Goerg is a "foreign representative" as is required by section 304, the estate of Kaussen is not a debtor as is contemplated under that section and 11 U.S.C. § 101(20); therefore, the bankruptcy court does not have jurisdiction to hear a case concerning the estate of Kaussen that is ancillary to a foreign proceeding concerning that estate.

The bankruptcy court properly found that by excluding probate estates from the definition of debtor, Congress made a deliberate choice to allow the state probate systems to dispose of property in an insolvent decedent's estate. It seems unlikely that Congress would exclude American decedent's estates from the bankruptcy code but allow foreign decedent's estates to be protected. The Fulton County Probate Court has exclusive jurisdiction over property located in Georgia which constitutes part of the Kaussen estate. For these reasons, the bankruptcy court properly deferred to the state probate system to allow the Fulton County Probate Court to dispose of Kaussen's assets located in Georgia.

Accordingly, this court affirms the bankruptcy court's order granting Parungao's motion to dismiss.

IT IS SO ORDERED this 8th day of January, 1987.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge

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[1] When a nonresident decedent has property or a cause of action in more than one county, letters of administration may be granted in any county in which such property or cause of action is located. The judge of the probate court who first grants such letters acquires exclusive jurisdiction.

O.C.G.A. § 15-9-32 (1985).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Docket Number C86-2096

William C. O'Kelley
United States District Judge

KLAUS HUBERT GOERG

v.

EDGARDO L. PARUNGAO

☒ Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

☐ IT IS ORDERED AND ADJUDGED

AFFIRMING bankruptcy court's order granting EDGARDO L. PARUNGAO's motion to dismiss.

Filed January 13, 1987

LUTHER D. THOMAS
Clerk

/s/ Pat [Illegible]
(By Deputy Clerk)

UNITED STATES BANKRUPTCY COURT
N.D. GEORGIA
ATLANTA DIVISION

Bankruptcy No. A86-04341-ADK

IN THE MATTER OF KLAUS HUBERT GOERG, as Trustee in Bankruptcy under the laws of the Federal Republic of Germany for the Estate of Heinz Guenter Kaussen Petition by German Bankruptcy Trustee for Ancillary Administration Pursuant to 11 U.S.C. § 304.

Aug. 26, 1986

Robert Goldstein, Kilpatrick & Cody, Atlanta, Ga., for petitioner.

Robert E. Hicks, Hicks, Maloof & Campbell, Atlanta, Ga., for respondent.

MEMORANDUM OF OPINION AND ORDER

A.D. KAHN, Bankruptcy Judge.

The above-styled proceeding was filed by Klaus Hubert Goerg [hereinafter referred to as "Petitioner"], the bankruptcy trustee of the estate of Heinz Guenter Kaussen appointed under the Laws of the Federal Republic of Germany, petitioning this Court for ancillary administration pursuant to 11 U.S.C. § 304. It is before the Court on a Motion to Dismiss filed by Edgardo L. Parungao [hereinafter referred to as "Movant"], the administrator of the estate of Heinz Guenter Kaussen appointed by the Probate Court of Fulton County, Georgia. Movant

contends that the instant proceeding should be dismissed for the following reasons: 1) that the Court lacks jurisdiction over the subject matter; 2) that the Court lacks jurisdiction over the person; 3) that the Petition fails to state a claim upon which relief can be granted; 4) that the Petition fails to join necessary parties; and 5) that this Court should abstain from exercising jurisdiction pursuant to 28 U.S.C. § 1334 and 11 U.S.C. § 305. The Court finds it necessary to address only the first of these grounds.

The instant Petition calls upon this Court to exercise jurisdiction over assets of the estate of Heinz Guenter Kaussen located in the Northern District of Georgia. Kaussen, a citizen of the Federal Republic of Germany, died in April of 1985. After determining that the estate was insolvent, the German probate administrator petitioned the Cologne Local Court to commence bankruptcy proceedings for the purpose of liquidating the estate. An Order of Adjudication determining that the estate was insolvent and appointing Petitioner herein as the bankruptcy trustee was entered by the Cologne Local Court on January 24, 1986. *See* Appendix to Brief of Petitioner Klaus Hubert Goerg in Opposition to Respondent's Motion to Dismiss at Tab 1. Kaussen's estate is now being liquidated under the supervision of the Bankruptcy Division of the Cologne Local Court, pursuant to Section 215 of the Konkursordnung (Section 215 of the German Bankruptcy Act). The Order of Adjudication was affirmed on appeal by the Cologne Regional Court on February 17, 1986 and by the Cologne Higher Regional Court of Appeals on March 3, 1986 and April 28, 1986.

> The Cologne Local Court stated that Inasfar as succession by inheritance has occurred under the laws of this state or of a foreign state, the rights of the heiress, the heirs or an administrator to dispose of movables and immovables of the estate are no longer in effect due to the universal effect of the commencement of bankruptcy proceedings.

Order of Cologne Local Court entered January 24, 1986 at 2 contained in Appendix to Brief of Petitioner Klaus Hubert Goerg in Opposition to Respondent's Motion to Dismiss, Tab. 1.

In its Decree of April 28, 1896, [sic] the Cologne Higher Regional Court of Appeals stated that

> The dispute as to whether the so-called principle of territoriality or the so-called principle of universality shall prevail in the bankruptcy proceedings, i.e., whether the bankruptcy commenced in the Federal Republic encompasses the entire property of the Debtor—irrespective of its situs—, was in recent rulings of the Federal Court of Justice ruled on in favor of the principle of universality, which the Division of Civil Matters of this Court agrees with . . . This means: In addition to the domestic property, the Debtor's bankrupt estate shall further include the Debtor's property located abroad. The latter, too, shall be placed in custody and used by the Trustee . . . Any duties of the Debtor in handling the bankruptcy proceedings shall therefore include the property located abroad.
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> * * * *
>
> A further legal consequence is derived from the above in that the rights of the heiress or any other person authorized to dispose of the property constituting part of the estate has expired, which includes the property located abroad.

Decree of the Cologne Higher Regional Court of Appeals dated April 28, 1986 at 2-3, 5 contained in Appendix to Brief of Petitioner Klaus Hubert Goerg in Opposition to Respondent's Motion to Dismiss, Tab 4. It appears that the Cologne Higher Regional Court of Appeals is the highest Court of review available under German law. Petition at ¶ 6.

Thus, against this background, Petitioner filed the instant proceeding to enforce here the liquidation proceedings in Germany. Apparently concurrently with the German bankruptcy proceedings, Movant was appointed by the Probate Court of Fulton County, Georgia as administrator of Kaussen's local estate. Movant is a German national who was a close associate of Kaussen. Kaussen's heirs at the time of his death were also citizens of the Federal Republic of Germany. Movant asks this Court to dismiss this proceeding so that the proceedings in the Probate Court of Fulton County may go forward. It appears that despite the holdings of the German Courts, Kaussen's heirs will receive property from the estate within the jurisdiction of the Probate Court.*

Section 304 of the Bankruptcy Code provides that

> (a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.
>
> (b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may—
>
> (1) enjoin the commencement or continuation of—
>
> (A) any action against—

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* Under a settlement approved by Superior Court of Fulton County, Georgia and the Probate Court of Fulton County, Georgia, distributions from the estate are to be paid 20% to each of Kaussen's four children and Mrs. Ingelborg Skowronek, mother of the children and Kaussen's lifetime companion. "Order Approving Agreement of Settlement and Compromise Concerning the Will of Guenter Kaussen under the Laws of Georgia" filed July 17, 1985 in Superior Court of Fulton County, Georgia, attached as Exhibit A to Motion for Appointment of Guardian Ad Litem.

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief. (c) In determining whether to grant relief under subsection (b) of this section, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with—

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

In applying § 304, the Court must first examine whether Petitioner is "foreign representative" in a

"foreign proceeding." Section 101(21) defines "foreign representative" as a "duly selected trustee, administrator, or other representative of an estate in a foreign proceeding." Section 101(20) defines "foreign proceeding as a

> proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganization.

This definition makes reference to the "debtor's domicile. . . ."

The term "debtor" is defined in § 101(12) as a "person or municipality concerning which a case under this title has been commenced." "Person" is defined in § 101 (33) as including "individual, partnership and corporation, but does not include governmental unit. . . ."

Section 109(a) of the Bankruptcy Code sets out who may be a debtor under Title 11 and provides that "[n]otwithstanding any other provision of this section, only a *person* that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title." It is well established that a probate estate is not a "person" within the meaning of the Bankruptcy Code. *In re Brown*, 16 B.R. 128 (Bankr. D. D.C. 1981). *See also In re Jarrett*, 19 B.R. 413 (Bankr. M.D. N.C. 1982). Therefore, unlike the laws of the Federal Republic of Germany, the estate of Kaussen is ineligible for relief under the bankruptcy laws of the United States.

It is clear, however, that a petition pursuant to § 304 does not commence a "case" under Title 11. The legislative history states that

> [t]his section governs cases filed in the bankruptcy courts that are ancillary to foreign proceedings. That is, where a foreign bankruptcy case is pending concerning a particular debtor and that debtor has assets in this country, the foreign representative may file a petition under this section, *which does not commence a full bankruptcy case*, in order to administer assets located in this country, to prevent dismemberment by local creditors of assets located here, or for other appropriate relief. The debtor is given the opportunity to controvert the petition.

Report of the Committee on the Judiciary, S. Rep. No. 989, 95th Cong., 2nd Sess. 35 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5821. The question then becomes must there be a "debtor" within the meaning of the Bankruptcy Code in order to invoke the jurisdiction of this Court through § 304?

The Court has carefully considered the briefs submitted by the Parties on this issue. From the facts before the Court, there are very strong reasons to exercise jurisdiction for the sake of comity. Here we have German nationals, who have lost their appeals to assert their interests in Kaussen's estate in the Courts of the Federal Republic of Germany, turning to the probate laws of the State of Georgia. In Georgia, they will receive what they could not from their own home courts.

On the other hand, the Court must work within the Bankruptcy Code as it is written. A methodical examination of the definitions provided in the Code leads the Court to the unavoidable conclusion that one must qualify to be a "debtor" under the Code before this Court can exercise its jurisdiction pursuant to § 304. In the United States, each state has a system for liquidating and disposing of the estates of deceased persons. This includes those of United States citizens as well as those of foreign nationals. By not including probate estates as entities eligible for relief under the Bankruptcy Code, Congress

deliberately chose these state systems for disposing of property in probate estates over the national bankruptcy system provided for in the Code. The Court is unable to find any authority to demonstrate that Congress intended to make an exception for foreign probate estates.

In addition to the lack of any positive statement from Congress, determination of eligibility requirements of § 304 is further complicated by the paucity of cases regarding this section. A few cases focus on the application of the factors listed in § 304(c). *See, e.g., In re Toga Mfg. Ltd.*, 28 B.R. 165 (Bankr. E.D. Mich. 1983); *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982). Two courts have stated or, at least assumed that, the existence of a "debtor" under the Bankruptcy Code was a prerequisite to relief under § 304. In *Angulo v. Kedzep, Ltd.*, 29 B.R. 417 (S.D. Tex. 1983), the Court concluded that because it was shown that Kedzep could be a debtor under Chapter 11 of the Bankruptcy Code, the Trustee had "met the threshold prerequisites for application of section 304." 29 B.R. at 418. The Court in *Universal Casualty & Sur. Co. v. Gee (In re Gee)*, 53 B.R. 891 (Bankr. S.D.N.Y. 1985), held that only the requirement of § 109(a) must be satisfied in order to qualify for relief under § 304. Section 109(a) provides that "[n]otwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title."

The treatise *Collier on Bankruptcy* discusses the very issue before the Court and questions whether jurisdiction can be exercised pursuant to § 304 under these circumstances.

> [T]hat a foreign administration of a decedent's estate *is not* a "foreign proceeding" under section 101(20) is suggested by the fact that both sections 101(20) and 304 refer to a "debtor," which the Code

> defines to mean a person or municipality, and a "person" under the Code does not include a decedent's estate. And at least one court has held that the threshold prerequisites for application of section 304 include a showing that the foreign debtor could be a debtor under the Code. Moreover, that Congress could have intended to exclude American decedents' estates from the protection of the Bankruptcy Code while extending that protection to foreign decedents' estates is a questionable proposition. It may also be significant that the Uniform Probate Code, which the Commission deemed adequate to cover domestic administration of insolvent decedents' estates, provides for "ancillary administration" by "foreign personal representatives."

2 *Collier on Bankruptcy* ¶ 304.01 at 304-12 (15th ed. 1986) (footnotes omitted) (emphasis in original).

In the instant proceeding, if comity was the only factor to be considered, this Court would not hesitate to exercise its jurisdiction. As the facts now appear before the Court, this is mainly a contest between the German bankruptcy trustee and Kaussen's heirs. The heirs have lost in their own home courts and are now pursuing their claims in a more favorable forum, to wit: the Probate Court of Fulton County, Georgia. It does seem to be a great affront to the principles of comity to allow this to occur. However, this Court is convinced that it is unable to exercise its jurisdiction to enforce the orders of the German Courts because the drafters of the Code intended that an entity must qualify to be a "debtor" under the Code before relief can be entered pursuant to § 304. It is an unfortunate result in this particular case under these particular circumstances, but, as a general policy, the Court sees the wisdom in deferring to the state court probate systems in handling decedent's estates.

ORDER

Therefore, in accordance with the reasoning above, it is the Order of the Court that the Motion to Dismiss filed by Edgardo L. Parungao be, and the same hereby is, GRANTED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8161

D.C. Docket No. 86-2096

IN RE: KLAUS HUBERT GOERG,
Debtor.

KLAUS HUBERT GOERG,
Plaintiff-Appellant,

versus

EDGARDO L. PARUNGAO,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Before RONEY, Chief Judge, TJOFLAT, Circuit Judge, and CLEMON *, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

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* Honorable U. W. Clemon, U.S. District Judge for the Northern District of Alabama, sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, REVERSED; and that this cause be and the same is hereby, REMANDED with instructions that the bankruptcy court entertain Plaintiff Goerg's section 304 petition;

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: May 18, 1988

For the Court: MIGUEL J. CORTEZ
Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

Issued as Mandate: Jul. 29, 1988

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-8161

IN RE: KLAUS HUBERT GOERG,
Debtor.

KLAUS HUBERT GOERG,
Plaintiff-Appellant,

versus

EDGARDO L. PARUNGAO,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITIONS FOR REHEARING AND
SUGGESTIONS OF REHEARING IN BANC

(Opinion May 18, 11 Cir., 1988, —— F.2d ——).

(Filed July 18, 1988)

Before RONEY, Chief Judge, TJOFLAT, Circuit Judge, and CLEMON,* District Judge.

PER CURIAM:

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* Honorable U. W. Clemon, U.S. District Judge for the Northern District of Alabama, sitting by designation.

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 3-86-01940JR

IN RE PETITION OF KLAUS HUBERT GORG, [sic] as Receiver, Trustee in Bankruptcy and Foreign Representative of the Estate of Heinz-Gunter [sic] Kaussen, deceased (debtor in a Foreign Proceeding).

[Filed Aug. 15, 1986]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The motion for preliminary injunction of petitioner KLAUS HUBERT GORG, [sic] Receiver, Trustee in Bankruptcy and foreign representative of the estate of Heinz-Gunter [sic] Kaussen, deceased, ("Petitioner"), came on for hearing on July 14, 1986 before the Honorable Jack Rainville, United States Bankruptcy Judge. Petitioner's motion requests that this court enjoin JAMES R. SCANNEL, Public Administrator ("Administrator"), from taking certain actions with respect to the estate of Heinz-Gunter [sic] Kaussen, aka Guenter Kaussen, deceased, Petitioner's debtor in a foreign proceeding. The court having considered the petition, the motion for preliminary injunction, and the declarations and memoranda submitted in support of said motion and in opposition thereto, and having heard oral argument in open court, and the matter having been submitted for decision, the Court hereby makes the following

FINDINGS OF FACT

1. Heinz-Gunter [sic] Kaussen, a domiciliary and citizen of the Federal Republic of Germany, died on or about April 15, 1985 in Cologne, Germany.

2. Subsequent to April 15, 1985, a probate proceeding was commenced in the Courts of the Federal Republic of Germany.

3. Upon the application of the German probate administrators, the estate of Heinz-Gunter [sic] Kaussen was declared insolvent, and Petitioner was duly appointed Receiver and Trustee in Bankruptcy with respect to said estate.

4. There is now pending in the Superior Court of the State of California for the City and County of San Francisco a probate action entitled "In the Matter of the Estate of Guenter Kaussen Deceased, No. 240596," pursuant to which Administrator has been issued Letters of Administration.

5. On July 3, 1986, Petitioner moved this court for a preliminary injunction preventing Administrator from distributing the assets of, or paying or settling claims against, the Estate of Guenter Kaussen. Petitioner's motion was made on the ground that there was a substantial likelihood that Petitioner would be granted relief pursuant to 11. [sic] U.S.C. Section 304, and that the motion would prevent irreparable harm to Petitioner pending the determination of the merits of his petition for relief.

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact are conclusions of law, the same are incorporated herein.

2. The probate proceeding pending in the Federal Republic of Germany in which Petitioner was appointed

Receiver and Trustee in Bankruptcy of the estate of KAUSSEN is not a "foreign proceeding" as defined in 11 USC Section 101(20).

3. This Court has no jurisdiction over the estate of KAUSSEN, deceased, being administered in the Superior Court of the State of California, in and for the City and County of San Francisco (No. 240596), the assets of KAUSSEN, deceased, being administered therein, the Administrator to whom Letters of Administration have been issued therein, creditors' claims against the decedent asserted therein, nor persons asserting to be entitled to distribution of said estate.

4. The motion for preliminary injunction should be denied.

Dated: August 15, 1985

/s/ Jack Rainville
JACK RAINVILLE
U. S. Bankruptcy Judge